



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 24, 1996

Mr. J. Robert Giddings
Office of General Counsel
The University of Texas System
201 West 7th Street
Austin, Texas 78701

OR96-1739

Dear Mr. Giddings:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 35836.

The University of Texas System (the "system") received a request for information pertaining to Optional Retirement Plan ("ORP") products and investments comprising:

1. All written criteria, rules, standards, regulations or other information which was utilized by the University of Texas System and its committees in selecting, evaluating or approving companies authorized to sell ORP investments and products.
2. Minutes of any meetings, memorandums of meetings, or other written documents setting forth the nature and substance of all meetings by and among individuals and/or committees charged with or responsible for the selection, evaluation and approval of companies authorized to sell ORP products and investments.
3. All documents reflecting reports prepared by any experts or consultants utilized by the University of Texas System and its committees in promulgating any regulations, standards or criteria governing the approval process or which reflect the recommendations of such experts or consultants to the University of Texas.

4. All responses to written questionnaires or other requests for proposals submitted by companies which sought approval to sell ORP products and investments and submitted to the University of Texas System.

5. All correspondence relating to the application and approval process sent by the University of Texas System, its agents and committees, to companies seeking approval to sell ORP products, or sent by such companies to the University of Texas System, its agents and committees.

6. All other written documents and public records which relate to the selection and approval of any company authorized by or approved by the University of Texas System to sell ORP products and investments to faculty and staff at the University of Texas System,

You have submitted four banker boxes of documents for our review and you contend the requested information is excepted from required public disclosure under the sections 552.103, 552.104, 552.110 and 552.111 of the Government Code.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The system has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The system must meet both prongs of this test for information to be excepted under section 552.103(a). The single fact that a request for information is made by an attorney is not in and of itself sufficient to invoke section 552.103, the claim that litigation may ensue must be more than conjecture. Open Records Decision No. 518 (1989).

The system offers in support of its argument of anticipated litigation a handwritten caption of "Miller v. U.T. System" on a return receipt card, written by an unidentified person, as well its opinion that since the requestor was not permitted to participate in the system's optional retirement plan that the requestor must be planning to litigate. We conclude this is insufficient to meet the first prong of the exception that the documents requested are related to litigation and consequently, we do not address the second prong of the litigation exception. Therefore, the system may not withhold any of the requested documents under section 552.103.

Section 552.104 of the Government Code states:

Information is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder.

The purpose of this exception is to protect the interests of a governmental body in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Additionally, once the competitive bidding process has ceased and a contract has been awarded, section 552.104 will not except from disclosure either information submitted with a bid or the contract itself. *See* Open Records Decision Nos. 541 (1990) at 5, 514 (1988), 319 (1982), 306 (1982). Our review of the documents indicates that the system implemented the revised Optional Retirement Program with the selected companies effective September 1, 1995. Consequently, you may not withhold any of the documents submitted under section 552.104.

Next, we address your assertion that section 552.107 of the Government Code excepts some of the requested information from required public disclosure. Section 552.107(1) excepts from disclosure:

information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Information may be withheld under section 552.107(1) only to the extent that it documents confidences of a governmental representative to its attorney or reveals the attorney's legal advice and opinions. *Open Records Decision Nos. 589 (1991), 574 (1990)*. Moreover, a governmental body may waive the protection of the attorney-client privilege by voluntarily disclosing the material to outside parties. *Open Records Decision No. 630 (1994) at 4*. You have not shown how this section applies to the documents forwarded for examination under this exception aside from the tag "attorney client privilege." Nonetheless, we have marked some documents clearly constituting legal memorandums that may be withheld from disclosure under section 552.107. We conclude that you have not met your burden regarding the remaining information that you claim is excepted under section 552.107.

The system also asserts that the materials are excepted under section 552.110 as the vendors of mutual funds have "significant trade secret/proprietary information interests" in the documents. Section 552.110 excepts from disclosure "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision."

If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5. In the instant case, the system only asserts that the applicability of section 552.110 be considered in accordance with a previous letter ruling, Open Records Letter No. 95-587 (1995), but the system offers no further argument as to whether it has any direct trade secret interest in the contents of the responses. We note that all the vendors submitting responses to the system's request were sent a letter giving them each the opportunity to submit any objection to the release of the information. None of the vendors submitted any objections to the release of the information. Accordingly, the system may not withhold any of the information under section 552.110.

Section 552.111 of the Government Code excepts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. See Open Records Decision No. 615 (1993). This exception is intended to protect advice and opinions given on policy matters and to encourage frank and open discussions within an agency in connection with the agency's decision-making processes. *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 412 (Tex. App.--Austin 1992, no writ) (citing *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.)). Additionally, it must be noted that an agency's policymaking functions do not encompass routine internal administrative and personnel matters. Open Records Decision No. 615 (1993) at 5.

In invoking this exception we note that it is unclear what policymaking process the system is referencing. The custodian of records has the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). A general claim that section 552.111 applies to particular documents when it is clear that the exception does not apply to all of the information in the documents does not comport with the procedural requirements of the Open Records Act. Open Records Decision No. 419 (1984) at 3. The system has submitted bundles of documents for review under this exception with a tag reading "outside consultants" and "ORP Advisory Committee" respectively, without more detail as to what within the documents actually falls under the section 552.111 exception. In conclusion, without the benefit of any explanation of how the material relates to the policymaking process, the section 552.111 burden is not met. The information must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



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JIM/rho

Ref.: ID# 35836

Enclosures: Marked documents

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